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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1979

No. 79-119

MITCHELL G. VEITCH,
Petitioner,

vs.

SUPERIOR COURT OF THE COUNTY OF SANTA CLARA, STATE OF CALIFORNIA,
Respondent,

THE PEOPLE OF THE STATE OF CALIFORNIA,
Real Parties in Interest.

ON PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEAL OF THE STATE OF CALIFORNIA, FIRST APPELLATE DISTRICT

BRIEF OF THE STATE PUBLIC DEFENDER OF CALIFORNIA AS AMICUS CURIAE IN SUPPORT OF THE PETITION FOR WRIT OF CERTIORARI

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INTEREST OF AMICUS CURIAE AND CONSENT

The State Public Defender of California is an agency of California state government which is charged with the representation on appeal of indigent criminal defendants. The outcome of the instant case will have substantial impact upon the rights of many persons being represented by this office, as well as upon the public as a whole, to be free from double jeopardy. An outcome in petitioner's favor will also tend to reduce judicial trial and appellate backlogs, and will thus work substantial benefit for the administration of justice in

general. Accordingly, the State Public Defender of California is filing this brief amicus curiae in support of the petitioner herein.

This brief is filed pursuant to Rule 42 of the Rules of this Court. Consent to the filing of the brief has been given by Mr. Robert L. Mezzetti, Esquire, and by the office of the Attorney General of the State of California, counsel for petitioner and respondent, respectively. Letters reflecting such consent have been forwarded to the Clerk of this Court under separate cover, and should be on file in his office.

ARGUMENT

I

CERTIORARI SHOULD BE GRANTED TO DETERMINE WHETHER A POST-VERDICT FINDING OF INSUFFICIENT EVIDENCE BY THE TRIAL COURT SHOULD CARRY LESS SIGNIFICANCE FOR DOUBLE JEOPARDY PURPOSES THAN THE SAME FINDING BY A COURT OF APPEAL

Introduction

Petitioner Mitchell Veitch was tried by a jury in a California court on various felony charges (Petn. p. 4). At the conclusion of the trial, the trial judge entertained and granted a motion for new trial pursuant to California Penal Code section 1181(6) on the grounds the verdict was contrary to the evidence.

It is the purpose of this brief amicus curiae to urge that certiorari be granted in order to declare that society has no greater interest in retrying a defendant when it is decided by the *trial* judge that the jury could not properly have returned its verdict than it does where such a declaration is made by three *appellate* judges following a long and costly appeal. (*Burks* v. *United States* (1978) 437 U.S. 1, 98 S.Ct. 2141, 2150.) It should be recognized instead that it is very much more in society's interest—to say nothing of the interests of justice—that such a determination be made with celerity, and that it be made by a judicial officer in the best position to make it accurately: the trial judge.

* * * *

Under present California law, an accused person whose guilt of crime has not been satisfactorily established during the course of a jury trial has three opportunities to seek relief from the trial judge: (one) he may move for a judgment of acquittal at the close of the prosecution's case-in-chief; [1] (two) he may make or renew a similar motion a the close of all evidence; [2] or, (three) he may make a motion for new trial after the return of a verdict of "guilty" by the jury.[3]

Should the trial judge grant relief to such a defendant prior to the submission of the case to the jury, the relief so granted is complete: No appeal will be available to the state, and the case may not be retried.[4] Moreover, even if there were not a statutory bar to retrial, the constitutional prohibition against double jeopardy would independently bar the retrial of a case aborted prior to verdict (since there would not be any verdict to reinstate). Cf. *United States* v. *Wilson* (1975) 420 U.S. 332.

But if, as here, a California court should await the return of a verdict to grant relief, it would find its powers to do so sharply curtailed—even in the event of a total failure of proof. The defendant would find his protection against double jeopardy equally curtailed. No longer could the court grant a judgment of acquittal, even one subject to appellate review. Instead, should the verdict be found to be "contrary to law or evi-

[1] California Penal Code section 1118.1.
[2] *Ibid.*
[3] California Penal Code section 1181(6).
[4] California Penal Code section 1118.2.

dence," [5] the greatest relief which could be granted by the trial judge would be a new trial—and even that would be subject to a government appeal.[6]

It is hard indeed to conceive of a case in which a failure of proof would not have been apparent to the court in time to grant a final judgment of acquittal prior to submission of the case to the jury. Thus, under the California statutes, an ostensibly "not guilty" criminal defendant may lose substantial rights as the result of no more than procrastination by the trial judge[7], who by definition should never have allowed the case to be *submitted* to the jury. (*Burks* v. *United States, supra,* 98 S.Ct. at 2150.)

Of course, if such a "not guilty" defendant wished to avoid the necessity of retrial, he might elect to forego making a motion for new trial and have the failure of proof declared by a court of appeal. While doing so would clearly bring such a defendant under the protection of *Burks,* it would also require the efforts of a new set of lawyers and the time of at least three appellate justices. The case would remain unresolved for months or years, and many thousands of public dollars would be wasted on something which could have been done simply and forthrightly by the trial judge.

It is clear that the standard to be applied by a Califor-

[5] California Penal Code section 1181(6), *supra.*
[6] California Penal Code section 1258(3).
[7] As the Court is doubtless aware, a judge trying a federal case retains the power to acquit following the submission of a case to the jury. Federal Rules of Criminal Procedure, Rule 29(b) (18 U.S.C.A.)

nia trial judge passing on a motion for a new trial and that to be applied by a reviewing court in dealing with a contention of insufficient evidence is substantially identical—especially following last term's decision in *Jackson* v. *Virginia* (1979) 443 U.S. __ [47 U.S.L.Week 4883].[8] The trial judge does *not* sit as a "thirteenth juror," but instead as an overseer who determines whether the jury has reasonably discharged its duty.

As a California court of appeal recently pointed out,[9] the State Supreme Court's decision in *People* v. *Robarge* (1953) 41 Cal.2d 628, 633, 262 P.2d 14, provides the controlling definition of the test to be employed on motion for new trial:

> "It has been stated that a defendant is entitled to two decisions on the evidence: one by the jury and one by the court . . . *This does not mean, however, that the court should disregard the verdict or that it should decide what result it would have reached if the case had been tried without a jury, but instead that it should consider [whether] . . . there is sufficient evidence to support the verdict.*" (Emphasis added.)

It can be seen at once that the California standard applicable to motions for new trial is both substantially similar to that employed by the federal courts when

[8] Prior to *Jackson*, and at the time the state appellate court wrote its decision in the instant case, it could be said that a trial judge had some powers to weigh the whole of the evidence while the State's apellate courts had none at all. See *Leonard M.* v. *California* (1979) 443 U.S. __ (No. 78-1144, July 2, 1979) *vacating and remanding In re Leonard M.*, (1978) 85 Cal.App.3d 887.

[9] *People* v. *Montgomery* (1976) 61 Cal.App.3d 718, 730, 132 Cal.Rptr. 558.

they pass on motions for judgment of acquittal under Rule 29, and that the standard is essentially an appellate one. Cf. *Burks* v. *United States* (1978) *supra*, 98 S.Ct. at 2150, *and see United States* v. *Evans* (5th Cir. 1978) 572 F.2d 455, 476.[10]

It should be equally apparent that there is no rational basis for affording greater double jeopardy protection to wrongly convicted "not guilty" defendants whose status is determined through the laborious appellate process, (*Burks* v. *United States, supra,* (1978) 437 U.S. 1; *Greene* v. *Massey* (1978) 437 U.S. 19) as opposed to those defendants whose status is promptly declared by the trial judge.

To maintain such an anomolous distinction will cause an even greater overloading of the appellate courts by trial courts unable to afford the luxury of trying cases twice in the face of steadily mounting backlogs of cases which have not even been tried once.[11]

CONCLUSION

The instant case would seem an ideal one in which to

[10] Any argument which might have been available to the prosecution that the trial judge applied an unduly broad standard in passing on the motion was waived by their failure to appeal from the order granting it. Cf. *United States* v. *Rojas* (9th Cir. 1977) 554 F.2d 938.

[11] In 1977–78, out of 55,532 felony filings, there were 5,823 contested trials in California. 3,284, or 56% of these matters went on to appeal. Only 153 motions for new trial were granted by trial courts, which amounts to 2.6% of contested matters or three-tenths of one percent of all filings. (Data extrapolated from California Administrative Office of the Courts, *Annual Report* (1979) table X-A, p. 56; table XVII, p. 63; and table XX, p. 73.

The number of motions for new trial granted was supplied to us by the Administrative Office of the Courts by means of a letter dated August 8, 1979.

clear up a substantial anomaly which has grown up in the wake of *Burks* v. *United States, supra* as well as to relieve an unnecessary burden on both the appellate and trial courts. For this reason, we respectfully request that the petition for certiorari be granted.

Respectfully submitted,

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